Swift Independent Packing Company *and* United Food and Commercial Workers International Union, AFL–CIO. Case 13–CA–21274–S

December 16, 1994

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS STEPHENS, DEVANEY, AND BROWNING

On June 30, 1992, Administrative Law Judge Joel A. Harmatz issued the attached decision. The Respondent filed exceptions and a supporting brief and the General Counsel filed a brief in response to the Respondent's exceptions.

The Board[1] has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Swift Independent Packing Company, Chicago, Illinois, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] Member Cohen took no part in the consideration of this case.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Additionally, the Respondent asserts that the judge's findings are a result of bias and prejudice. After a careful examination of the entire record, we are satisfied that this allegation is without merit.

Linda McCormick, Esq., for the General Counsel.
William H. Bruckner, Charles E. Sykes, Judith Sadler, Esqs. (Bruckner & Sykes), of Houston, Texas, for the Respondent.

SUPPLEMENTAL DECISION

JOEL A. HARMATZ, Administrative Law Judge. On June 29, 1988, the National Labor Relations Board issued a Decision and Order, directing the Respondent, inter alia, to make whole all unit employees at the Respondent[1] Swift Independent Packing Company's Tampa, Florida meat sales facility for losses sustained by reason of the Respondent's reduction of the full range of transfer opportunities available under a subsisting collective-bargaining agreement—conduct deemed by the Board to have violated Section 8(a)(5) and (1) of the Act.[2] On December 23, 1988, the Respondent also referred to as SIPCO, entered a settlement stipulation, through which it agreed, inter alia, that it would pay all the backpay, if any, determined by the National Labor Relations Board to be due and owing to the Tampa employees under the terms of said Order.

Being unable to agree on the amount of backpay, the Regional Director for Region 13 on April 12, 1991, issued a compliance specification and notice of hearing, which, as later amended, set forth the General Counsel's claim on behalf of each claimant.[3] Thereafter, the Respondent filed an answer which declared affirmatively that no backpay is due.

Pursuant thereto, a hearing was conducted before me on February 24, 25, 26, and 27, 1991, in Tampa, Florida. Following close thereof, briefs were submitted on behalf of the General Counsel and the Respondent.[4]

A. *Overview*

On July 8, 1981, SIPCO closed its meat sales operation in Tampa, Florida. The governing collective-bargaining agreement endeavored in various ways to cushion the impact of the associated loss of jobs. Central to the instant controversy is a provision granting the affected employees the right to transfer ''to another plant covered by this Agreement.'' SIPCO declined to permit the employees to exercise transfer rights to locations operated by other corporate entities, including its wholly owned subsidiary, New Sipco, Inc., even though these independent firms were covered by that agreement. In this connection, on June 29, 1988, the Board issued a Decision and Order concluding that:

> Respondent SIPCO violated Section 8(a)(5) and (1) by failing to provide the unit employees in the Tampa, Florida facility the full range of transfer opportunities set forth in the master agreement.

Having so found, the Board ordered, inter alia, that the Respondent SIPCO take the following affirmative action:

> Make whole all unit employees of the Tampa, Florida facility for any losses they may have suffered as a result of the Respondent's denial of the full range of transfer opportunities provided for in the 1979-1982 master collective-bargaining agreement . . . with interest.

[1] At the hearing, for reasons stated on the record, the Respondent's motion to dismiss was granted as to Swift Independent Corporation and New Sipco, Inc. (G.C. Exh. 1(vv).) Although the settlement agreement referred to in this proceeding covered these firms as well, as shall be discussed infra, their obligation has been discharged in full, untouched by any meaningful dispute. On the other hand, the instant compliance specification arises from a discreet unfair labor practice finding and a concommitant remedial order addressed only to Swift Independent Packing Company (SIPCO). 289 NLRB at 429, 432. Except for this firm, there is neither allegation, tenable theory, nor persuasive evidence that would warrant imposition of any further monetary liability on any other entity in this proceeding. Consistent therewith, the above caption has been amended to reflect deletion of Swift Independent Corporation and New Sipco, Inc.

[2] 289 NLRB 423.

[3] The specification names 23 former Tampa sales employees. Actually, the initial denial of transfer options affected 27 employees in that unit. However, four later accepted transfer to SIPCO's plant in National Stockyards, Illinois, and suffered no loss of pay or benefits. Accordingly, they have been excluded from this compliance specification.

[4] Errors in the transcript have been noted and corrected.

These matters later became the subject of an informal Board settlement. Thus, on December 21, 1988, the Board authorized the General Counsel to accept an adjustment of the above unfair labor practice in accord with a proposal authored by SIPCO. (R. Exh. 7.) By virtue thereof, the latter agreed to comply with its remedial obligation and to redress Tampa sales employees for denied transfer rights, as follows:

> 100% backpay, if any, for the Tampa employees as may be determined by the NLRB.[5]

Parenthetically, it is noted that SIPCO was one of several of respondents named in the unfair labor practice case. However, all the parties charged were not involved in the settlement agreement. Thus, there was no resolution of entirely distinct violations of Section 8(a)(1), (3), and (5), pertaining to employees at Guymon, Oklahoma, and Moultrie, Georgia plants insofar as attributed to certain other parties; namely, Esmark, Inc. and Swift & Company.[6] The Board found also implicated SIPCO, Swift Independent Corp., and New Sipco, Inc., in these violations. In their case, however, liability was discharged in the settlement agreement through a notice mailing and payment of a liquidated sum. Thus, in this latter regard, the settlement had broader reach than the Tampa sales unit. However, at Tampa, with the exception of SIPCO, the 8(a)(5) allegation founded on transfer rights was dismissed as to all other Respondents (Esmark, Inc., Swift & Company, Swift Independent Corp, and New Sipco, Inc.). Therefore, the sole remaining issue under that allegation pertains to the backpay obligation, if any, to Tampa employees, assumed by SIPCO under that accommodation.

The compliance specification seeks backpay from July 8, 1981, the date of closing of the Tampa sales unit, to December 3, 1988, when agreement was reached under the afore-described settlement agreement.[7] It identifies 23 former employees of the Tampa meat sales operation, each of whom on a timely basis, sought to implement their contractual transfer rights to one of the following plants:

> St. Charles, Illinois
> Omaha, Nebraska
> Tampa (PROC), Florida.[8]

All are deemed eligible by the compliance specification for backpay on the assumption that the collective-bargaining agreement provided transfer rights to these locations.

The Respondent takes issue with this premise on two counts. First, it is argued that the Board did not intend this result. In this regard, the defense centers on the fact that, when closed, the Tampa sales operation was owned and operated by SIPCO. However, at that time, the plants at St. Charles, Omaha, and Tampa (PROC) were owned and operated by Swift & Co. It is argued that SIPCO and Swift & Co. are distinct corporate entities, that the Board dismissed as to the latter, and therefore any construction of the contract assuming that SIPCO had an obligation to honor transfer options to Swift & Co. plants would offend the corporate separateness of the two firms and entail an improper disregard of the corporate veil—a result that the Board could not have intended.

The Respondent insists that the collective-bargaining agreement as enforced by the Board imposed an obligation on SIPCO only with respect to plants within its corporate bailiwick, namely, the Guymon and Moultrie locations. If meritorious, no backpay would ensue, for as the Respondent correctly observes, the options exercised by these individuals were confined to the plants of Swift & Co.[9]

In the alternative, the Respondent challenges the settlement agreement as enterred under an understanding that SIPCO incurred liability only to those Tampa sales employees who opted for transfer to New Sipco, Inc.'s plants at Guymon, Oklahoma, or Moultrie, Georgia, or if not, that the settlement is unenforcable since entered under a material mistake of fact. Alternatively, the Respondent contends that in no event are those who later opted for retirement or severance pay eligible for backpay. Beyond that, the Respondent does not dispute the formula set forth in the specification for determining gross backpay. However, at least in its answers to the specification, issues are raised as to the net amounts due, such as the quality of the search by certain claimants for alternative employment.

B. *Defenses Pertaining to Corporate Independence*

1. The emergence of corporate independence

As indicated, the Board's Order and its award of backpay derive from a provision of a master collective-bargaining agreement which conferred transfer rights to any plant covered by the contract. Thus, comprehension of the various positions of the parties requires some understanding of the scope of the contract as of its effective date, September 1, 1979, and during the balance of its term. The Respondent's contentions focus on what transpired in that timeframe.

On execution of the contract, there was no proprietary distinction between any of the covered plants, all of which were owned and operated by Swift & Company, the latter being the sole corporate signatory to the master agreement.[10]

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[5] See G.C. Exh. 4; R. Exh. 7.

[6] The latter refused to comply, and this aspect of the proceeding was contested in the Seventh Circuit Court of Appeals. On October 6, 1989, the court remanded that sector of the case for further consideration by the Board. See *Esmark, Inc. v. NLRB*, 887 F.2d 739. Following additional hearing before Judge William F. Jacobs, he issued a decision dismissing the afore-described 8(a)(1), (3), and (5) allegations in their entirety. Exceptions to that decision are now pending before the Board.

[7] G.C. Exh. 1(cc).

[8] This facility is not to be confused with the Tampa sales unit. It is a meat processing facility. At the time of the Tampa sales closure, the processing unit was operated by separate corporate entity; namely, Swift & Company. At all times material, the Tampa processing unit remained open. To avoid confusion, it is referred to as ''Tampa (PROC).''

[9] When the Tampa sales unit was closed, New Sipco, Inc., a wholly owned subsidiary of SIPCO, operated the facilities at Guymon and Moultrie. Both plants were closed temporarily on April 17, 1980. When reopened a month later, the master agreement was not applied to either location, a factor that might have influenced Tampa sales employees to exercise their options elsewhere.

[10] The unit covered, however, did not consist of a single comprehensive unit of all Swift & Company employees, but, instead, the Union was recognized as exclusive agent in separate units. However, the governing terms were set forth in this single, master agreement.

Hence, at that time, no limitation of the type now sought by the Respondent could be placed on the ''range of transfer opportunities provided for in the 1979–1982 master collective-bargaining agreement.'' In short, on September 1, 1979, that provision was not shadowed by any corporate separateness. All plants, including Tampa sales, Tampa (PROC), St. Charles, Omaha, Guymon, and Moultrie, were harbored under a single entrepreneurial roof, namely, Swift & Company.

The Respondent's claim of corporate independence rests on midterm changes which, in its view, reduced the enforceable ''range of transfer opportunities.'' From the inception of that agreement, Swift & Company, a signatory thereto, was a wholly owned subsidiary of Esmark.[11] It operated a number of plants throughout the country which were assigned to either its separate fresh meats and processed meats divisions. All were within bargaining units covered by the master collective-bargaining agreement.

During the term of the 1979–1982 master agreement, Esmark sought to divest itself of Swift & Company's fresh meat operations. In furtherance of this plan, on June 26, 1980, Esmark determined that this division would be transfered by Swift & Company to a distinct corporation, which then would be sold.

The initial step in this transaction, took place on September 3, 1980, when Swift & Company, created a new subsidiary called Transitory Food Processors. On October 21, 1980, Swift & Company transferred all of its assets to Transitory, except the fresh meat division. On October 24, 1980, Swift & Company's name was changed to SIPCO. Also effective October 24, the name of Transitory was changed to Swift & Co.[12]

By virtue of these transactions and name changes, as of that date SIPCO became the repository for the remaining fresh meat operations, including the Tampa sales operation and the Guymon and Moultrie plants. The new Swift & Co., which remained a subsidiary of SIPCO, owned and operated the meat processing division, including the processing facilities at Tampa (PROC), Omaha, and St. Charles.[13]

The separation of the new Swift & Company from SIPCO—still a wholly owned subsidiary of Esmark—was accomplished by a transaction which, while perfectly legitimate, apparently lacked supporting consideration. Thus, on October 27, 1980, SIPCO declared a dividend of all of the stock of Swift & Co., giving control and ownership of the meat processing operation to Esmark.[14]

At this point, Esmark owned the stock of both SIPCO and the new Swift and Co. These firms continued separately to honor the master collective-bargaining agreement.

Esmark intended to rid itself of SIPCO through a public stock offering. To accomplish this, additional steps were necessary. First, on January 26, 1981, Swift Independent Corporation (SIC) was established. On February 23, Esmark and SIC entered an agreement whereby SIC purchased all of SIPCO's stock from Esmark in exchange for a promissory note for $100 million. Later, on April 21, SIC's stock was transferred back to Esmark with a $35 million promissory note payable by SIC to Esmark, for which Esmark surrendered SIC's original $100 million note. At this juncture, Esmark held all of SIC's stock, SIC held all of SIPCO's stock, and SIPCO owned the fresh meat operation. Esmark, beginning on April 22, through public sale, divested itself of 65 percent of SIC's stock, retaining a 35-percent interest.

The final step related to the Guymon and Moultrie plants. Both had been closed on April 17, 1981. It was intended that they be reopened under aegis of a new corporation. Thus, SIPCO created a new wholly owned subsidiary, New Sipco, Inc. Later in April 1981, the Guymon and Moultrie plants were transferred to New Sipco, Inc. As indicated previously, once reopened in May 1981, New Sipco, Inc., did not apply the master agreement to either plant.

This structural reorganization, culminating in the public sale of SIC, the owner of SIPCO, provides the crucial foundation for the defense that the master agreement imposed no obligation on SIPCO in connection with Swift plants, and hence it is not liable for any backpay that might have inured from assertion of transfer rights to the Tampa (PROC), Omaha, and St. Charles facilities.

2. The scope of compensable transfer rights

a. *The settlement agreement*

The Respondent insists that the settlement agreement embodied no intention to compensate employees who exercised transfer options to plants other than Guymon and Moultrie. This position draws its essence from a legal interpretation of SIPCO's liability allegedly held by Attorney Charles Sykes, who was not involved in the proceeding until the settlement stages. Consistent with his observations, it is a fact that Guymon and Moultrie were the only plants operated subject to the Respondent's control when the 23 named claimants attempted to exercise transfer options. Sykes also asserts that the settlement agreement did not contemplate compensation for those who sought jobs at Swift & Co. plants, as no contractual transfer opportunities existed to these locations.

To even think of maintaining this position successfully, the Respondent must establish an all-party understanding held prior to execution of the settlement agreement in consonance with Sykes' analysis. This possibility is confronted initially by the fact that his settlement proposal, on its face, is without limitation in its declaration that SIPCO assumed an obligation to provide ''100 percent backpay, if any, for the Tampa employees as may be determined by the NLRB.''

In the main, the Respondent's position rests on self-serving and a highly selective interpretation of two documents,

[11] Esmark was created by Swift & Company in April 1973 as a holding company with no production capability. All plants were owned and operated by Esmark's wholly owned subsidiaries, including Swift & Company.

[12] This firm is also referred to as the new Swift & Co.

[13] The Respondent now contends that contractual transfer options could be exercised to the Guymon and Moultrie plants operated by its wholly owned subsidiary, New Sipco, Inc. At this stage, the new Swift & Company was identically postured to that firm, in the sense that it was a wholly owned subsidiary of SIPCO. Consistent with the Respondent's reasoning, if transfer rights to Swift & Company plants were to be avoided, further action would be required to sever that firm from SIPCO's proprietary control.

[14] As stated by Judge Cudahy, on behalf of the Seventh Circuit Court of Appeals, Sipco, the owner of the fresh meat division is not a ''new'' company. Instead, it is an old company, dating back to the 19th century, which merely *gave away* its name and a large number of its operations.'' (Emphasis added.) *Esmark, Inc. v. NLRB*, 887 F.2d 739, 743 fn. 2 (7th Cir. 1989).

whose focus, in turn, pertains to different facets of this complicated proceeding and related actions before the Board and other forums. Thus, it is argued that an understanding in accord with its interpretation was manifested by the Union and the Board well before either party registered any formal claim that transfer rights to plants other than Guymon and Moultrie were compensable.

To substantiate union assent, the Respondent's posthearing brief points to a memo, dated November 20, 1989, about a year after the agreement was adopted. The document ostensibly forwarded by the Union's vice president, Frank R. Dininger, to Tampa sales employees.[15] The Respondent contends that Dininger's message evidenced the latter's understanding that the contractual transfer rights were limited to Guymon and Moultrie. The view is without merit. Apart from the fact that there is no indication that Dininger, his memo, or his understandings were part of the settlement process, the content of this memo is hardly reflective of concession. The document, from SIPCO's point of view, at best, is ambiguous, for it describes the litigation as based on attempts to avoid transfer rights ''under a master agreement *at Swift* or SIPCO plants in Moultrie, Georgia, and Guymon, Oklahoma. [Emphasis added.]'' Considering the fact that the 8(a)(1), (3), and (5) findings based on closedowns at Moultrie and Guymon presented the most notorious issues in controversy at the time, it is not suprising that Dininger mentioned these plants specifically. However, his objectives, insofar as discernible, did not require an exhaustive listing of the plants awarded transfer rights by the contract. In this context, he did include a specific reference to ''Swift,'' thereby eliminating any need to elaborate by itemizing each and every Swift plant within the spectrum of legitimate transfer rights. The absence of such a listing was not tantamount to concession that transfer rights were not viable at Swift plants.

As against the General Counsel, the Respondent points to Regional Director Elizabeth Kinney's letter to Esmark, dated March 28, 1989.[16] This document pertains to Esmark's obligation under the Board's Order. Esmark had no remedial interest in the settlement's adjustment of the transfer issue. Consistent therewith, this document does not address the rights of Tampa sales employees, but on its face is limited to SIPCO's shared responsibility with Esmark and others for the illegal closedowns at Moultrie and Guymon. The Respondent borders on desperation when it claims that this correspondence acknowledges that ''it was pretty clear to everyone . . . that no backpay was due the former Tampa employees.''

Beyond the writings penned by Kinney and Dininger the Respondent cites, no other documents are referred to in its brief to support its understanding of the parties' intent. Instead, the defense turns to heavy reliance on parol testimony by Attorney Sykes. In this regard, prior to the hearing, Sykes, on November 27, 1990, in a letter to Associate General Counsel Robert A. Allen, stated:

> I cannot accept your conclusion relative to Tampa. When *I settled this case with Paul Spielberg* and Bob Funk, they both asked me about Tampa. My response was the same in both cases. I told them that no backpay was due as it was my understanding that none of the Tampa employees, had sought to transfer to Moultrie or Guymon, but if they had, we would pay backpay to any Tampa employee who has been refused a transfer to Moultrie or Guymon. I am as clear on this point as I was on the three million being treated as interest. I agreed to pay backpay, if any only to Tampa employees who were denied transfer rights to Guymon and Moultrie, nothing more. [Emphasis added.]

On December 7, 1990, Sykes wrote John W. Peck, an NLRB compliance supervisor, as follows:

> I have repeatedly said prior to, during and after the settlement, SIPCO will pay the Tampa employees backpay who were denied transfer to Moultrie and Guymon. That has *always* been our position.[17]

Unfortunately, his testimony as to his dealings with the parties prior to execution of the settlement was not so clear. He could not swear that he mentioned or even discussed any such limitation verbally or in writing with Paul Spielberg. He does barely suggest that on one occasion such a comment was made to union officials. Thus, Sykes avers that this took place at union headquarters on October 4, 1988. The meeting was attended by the International Union's general counsel, George Murphy, its associate general counsel, Robert Funk, and a regional vice president, Roger Clark. His testimony as to what was said is limited to the following colloquy with his co-counsel on direct examination:

> Q. What else was discussed at that meeting?
>
> A. Well, we talked about the fact that it was the Tampa portion of the case and that if there was any back pay for anybody that we had refused to transfer to Guymon and Moultrie we would give them a hundred cents on the dollar whatever it was.
>
> I didn't think it was anybody. But if it was we'd pay them a hundred cents on the dollar.
>
> And then I told them that—we went on the next point, that that would be . . . the end of our—extinguish our obligations . . . and they comply with the remedial order.

Even were I to believe Sykes, this passing expression—conveyed to only one party—was too vague to establish mutuality. There was no specific declaration that those who sought transfer elsewhere would be excluded. His references to Guymon and Moultrie were not accompanied by explanation. He does not suggest that he expressly solicited union assent to any limitation on backpay, or that it was given. Finally, Sykes did not aver that the union attorneys waived any right to resolve within the dispute-resolution terms of his settlement proposal, any dispute as to the contractual validity of transfer options to plants owned and operated by Swift & Co.[18]

[15] R. Exh. 46.

[16] G.C. Exh. 11.

[17] R. Exh. 39.

[18] In connection with the backpay negotiations affecting the Guymon and Moultrie plants, pursuant to Sykes' suggestion, the Union sent a research auditor, Howard Foreman, to the latter's office to examine SIPCO's books and records. This occurred on October

Continued

Apart from the vagaries in his testimony, whatever Sykes' personal view, he neglected to incorporate any such qualification in the settlement agreement, electing instead to leave this and any other dispute concerning the scope of his client's liability to ''be determined by the NLRB.'' Moreover, the testimony bearing on the conversation does not establish to my satisfaction, that anyone within earshot would have assumed that Sykes agreed to this formula only because he labored under a mistake as to his client's liability. Instead, at best from SIPCO's point of view, it was a lawyer talking about his interpretation of past events, a position that would later be tested under the procedure he had proposed that very day. In any event, that which transpired at union headquarters that day was not witnessed by any representative of the Board, and Sykes should have known that anything said on that occasion could not bind later.[19]

While there is no evidence of assent to Attorney Sykes' alleged interpretation of the contract, the Board's Order or the settlement, the Respondent raises several collateral grounds or factors which in its view compels acceptance of that interpretation. Initially, it is observed that the Board distributed $3 million in liquidated sums to Guymon and Moultrie *discriminatees* with knowledge as to ''material disputes over the settlement agreement.'' Having done so, it is argued that the Board is foreclosed from contesting SIPCO's view. There is no question that representatives of the General Counsel, on November 5, 1990, began distributing these funds, together with a copy of the notice,[20] to said discriminatees with knowledge of the issue affecting the Tampa sales employees, and in the face of an admonition by Sykes conveyed in his letter dated September 21, 1990. Through that document, Sykes forwarded the signed notices, while stating that he had done so ''only with the express understanding and reservation that such execution shall be of no force and effect unless the matters raised in my August 16, 1990 are resolved satisfactorily.''[21]

By letter of November 20, 1990, over signature of Robert E. Allen, Associate General Counsel, Division of Enforcement Litigation, Attorney Sykes was informed of disagreement with SIPCO's interpretation concerning the entitlement of Tampa sales employees. As for Guymon and Moultrie discriminatees, the letter stated:

> [Y]ou will be pleased to hear that the General Counsel has decided to treat as interest the money paid by your clients pursuant to the settlement. Accordingly, the agency is in the process of distributing the money to the discriminatees without deductions of any kind.[22]

Contrary to the Respondent, the attempt by Sykes on September 21, 1990, to dictate conditions on the handling of those moneys was tantamount to a unilateral alteration of the scope of the settlement. The checks covering this sum had been in the hands of the Region since December 26, 1988, at least a year prior to any insinuation by the Respondent to the Board or its agents that no backpay was due the Tampa sales employees.[23] This payment was totally unaffected by any such controversy, and its distribution was deferred apparently because of a question as to whether it should be considered ''interest only.'' Notwithstanding Attorney Sykes' attempt to head off the distribution, once the General Counsel acceded to SIPCO's position in that regard,[24] there was no bar to implementation of that separable provision. For the payment was in consideration for the Board's agreement to release SIC, SIPCO, and New Sipco from major remedial directives that stemmed from the 8(a)(1), (3), and (5) findings. It was limited to employees in the Guymon and Moultrie units, was derived from entirely distinct unfair labor practices, and discharged a remedial obligation, which was totally lacking in relationship to any conduct or allegations pertaining to the Tampa unit. Thus, the distribution pertained to a separate part of the case, with separate consequences for a different class of employees and Respondents. The Tampa sales employees were not benefited by this action, and the General Counsel had done nothing, irreparable or otherwise,

25 and 26, 1988. Sykes admits that he understood that Foreman was simply an ''accountant'' who held no authority with respect to the then in progress settlement discussions. On direct examination, Sykes testified that Foreman asked for the Tampa records, whereupon Sykes allegedly responded that there was no backpay at Tampa. Foreman asked why. Sykes claims that he ''gave'' him a copy of General Counsel's Exhibit 23, a document reflecting that all Tampa transfer options were effected with respect to Swift plants. As might be expected, Foreman allegedly replied, ''well I don't know about that.'' According to Sykes, Foreman went on to state that if he had any questions about Tampa, he would get back to Sykes. He never did. On cross-examination, Sykes testified that the Tampa issue was raised by himself, not Foreman. As I understand his testimony, he showed Foreman a piece of paper with ''a big zero.'' Sykes' testimony in this respect was not denied, but I have my doubts as to whether Tampa was mentioned. I find it difficult to believe that Sykes would have been more demonstrative with this subordinate than he was with union attorneys and at least one high level official. In contrast with his alleged specificity with Foreman, Sykes admitted that, only a few months later, in January 1989, when he received a formal request for Tampa data from Nancy J. Harris, an NLRB compliance officer, there was no denial of liability, but he simply directed a paralegal to compile and submit the information. (G.C. Exh. 9.) Later, on October 30, 1989, pursuant to a request from Marge Peck, another NLRB compliance officer, Sykes supplied additional Tampa payroll records. (G.C. Exh. 12.)

[19] Funk testified, without contradiction, that Sykes stated during the initial meeting at union headquarters in the fall of 1988 that he ''had to make the settlement with the NLRB . . . .'' Indeed, any attorney practicing before the Board would know this to be the case. Whatever, the source, Attorney Sykes certainly was aware that no agreement would be binding without Board approval. His original handwritten proposal specifically stated that the adjustment was so conditioned. (G.C. Exh. 2.) In his followup proposal, prepared after Board attorneys signified that they could not recommend that the Board accept the original sum offered for Guymon and Moultrie employees, Sykes stated, ''I would appreciate your referring this offer of settlement to the NLRB for their consideration and review.'' (G.C. Exh. 4.) Sykes obviously was aware that formation of an agreement required full disclosure of all terms to the Board, and that the obligations embodied in the written proposal, once accepted, could not be altered by uncommunicated matters. Yet, no evidence was presented through Sykes, nor from any other source suggesting that any Board agent was informed prior to December 1988 of any limitation on the formula set forth in the final proposal.

[20] R. Exh. 23.

[21] R. Exh. 8.

[22] R. Exh. 15. Sykes replied to this letter on November 27, 1990, again appealing that the moneys not be distributed to Guymon and Moultrie discriminatees until the Tampa dispute is resolved. G.C. Exh. 18. However, as stated in the Allen letter that distribution was already in progress.

[23] R. Exh. 5.

[24] G.C. Exh. 19.

to compromise SIPCO's rights with respect to these employees.

Moreover, the Government's action in this respect was inoffensive to the terms selected by the parties to accommodate the rights of Tampa employees. Sykes' interpretation that Swift plants were out of bounds under the master collective-bargaining agreement, like any other potential conflict, was certainly within the realm of possibility when the parties entered their settlement. All such issues were relegated, expressly and without qualification, for resolution by the Board. Self-help, through an attempt to thwart performance of separable terms, was not an ancillary feature of that process. Having adopted a mechanism for dispute resolution, each side expressly protected itself against an attempt by one party to renounce all obligations simply by raising an interpretation unacceptable to the other as to any part. Accordingly, the distribution of the $3 million to Guymon and Moultrie employees legally was consistent with that formulation, and beyond the control of SIPCO and its counsel.

The Respondent also seeks to nullify the settlement agreement as predicated on a mutual mistake of fact. It does not assert, however, that it was victimized by any form of improper representation, nor is there substantial proof that it was disadvantaged deliberately by a party with superior knowledge. In this regard, having examined the references offered, it is concluded that the evidence does not substantiate that the Union or the General Counsel held to the view or even sensed that the settlement agreement foreclosed backpay for those who opted for transfer to Tampa (PROC), Omaha, or St. Charles.[25] Cf. *Orlandi v. Goodell*, 760 F.2d 78, 80 (4th Cir. 1985); *U.S. v. Fowler*, 913 F.2d 1382, 1389 (9th Cir. 1990). In other words, there is no evidence that the mistake, if any, was in the mind of anyone, prior to December 1988, or for that matter, thereafter, with the possible exception of Attorney Sykes. Cf. *Rice v. Truckline Gas Co.*, 323 F.2d 394, 396 (7th Cir. 1963); *Hashway v. Ciba-Geigy Corp.*, 755 F.2d 209, 211 (1st Cir. 1985). As a skilled attorney, if he held the view he now espouses, he should have preserved it in the agreement. Instead, the terms he proposed did not define his client's obligation as he allegedly understood it, but merely established a method for resolving any conflict that might exist as to that obligation. His choice of terms was not inherently suggestive that he did not intend the consequences of his own language or that he held a reasonable belief that the agreement was other than as he proposed. In these circumstances, the agreement was not so frail as to be subject to rescission because one party held an interpretation not communicated by the agreement. Having proposed, without further qualification, to leave any and all backpay disputes to the Board's determination, Attorney Sykes bound his client to the risk that his underlying legal interpretation might be rejected.

Finally, I take note of the General Counsel's assertion that the attempt by Attorney Sykes to limit the scope of the Tampa settlement was afterthought and nonexistent until 1990. There is ample room to suspect that this might have been the case. He made no unequivocal statement prior to execution of the settlement agreement that, due to corporate separateness, backpay for Tampa employees would not extend to Swift & Co. plants. Interestingly enough, it was Esmark, Inc., a separate corporate entity with no actual or potential liability to the Tampa sales employees, through its attorney, Douglas A. Darch, that first made this argument. Thus, Darch, by letter to Region 7, dated December 29, 1989, stated:

> It is Esmark's position that none of the employees at the Tampa sales unit are entitled to backpay. The reason is none attempted to transfer to other SIPCO Master Agreement plants and were denied that right.
>
> . . . .
>
> [Darch refers to a stipulation indicating that all Tampa sales transfer options were exercised with respect to plants of Swift & Co.]
>
> . . . .
>
> The General Counsel's theory regarding the transfer issue was that Swift & Co. and SIPCO were a single employer, or a joint employer or an alter ego. Consequently . . . SIPCO was obligated to offer transfer opportunities to its Tampa sales unit employees and Swift & Co. was obligated to permit those transfers. Thus, the denial of the twenty-seven employees' transfer requests would have been unlawful only if Swift & Co. were a single/joint employer or alter ego to SIPCO. Since the NLRB held Swift & Co. is not and was not a joint/single employer or alter ego of SIPCO, the denial of transfer requests to Swift & Co. plants was not unlawful.
>
> No other individuals requested a transfer, but was denied his/her request. See General Counsel Exhibit No. 383 (stipulation). Accordingly, Esmark submits there is no backpay due and owing to any individual on the payroll at SIPCO's Tampa sales unit.[26]

Sykes did not advance any such argument to any agent of the Board until the summer of 1990. Thus, in October 1989, a Board agent assigned to Region 7, Marge Peck, by telephone requested information concerning the Tampa case from Sykes. He provided the data on October 30, 1989. There was no mention that Tampa transfer rights were noncompensable.[27]

[25] At the hearing Attorney Sykes declared that, ''Washington never contemplated for a minute that these Tampa employees had transfer rights to Omaha, St. Charles, and Tampa . . . . It was only like a year and a half after the settlement, maybe even longer, a year and three quarters after the settlement.'' His assumption was not founded on any affirmative declaration on the part of the Board or any of its agents.

[26] G.C. Exh. 13. This argument would also foreclose the exercise of transfer rights to Moultrie and Guymon, for the same finding was made by the Board as between SIPCO and New Sipco. On July 8, 1981, when the Tampa sales unit was closed, these plants were owned by New Sipco. Moreover, Darch's position seeks to undermine the Board's finding. On the record before the Board, all options were exercised to plants of Swift & Co. Thus, were Darch correct, no substantial evidence would exist supporting the Board's finding that SIPCO unlawfully denied any contractual transfer benefits. In this light, the Board agents had no reason to accede to Darch's position.

[27] The examination of Sykes and certain documentation placed in the record on behalf of SIPCO suggests that the Board had a duty to inform SIPCO that it was claiming backpay on the basis of transfer options to Swift plants. It is clear, however, that during the period prior to August 16, 1990, the parties were primarily concerned

Continued

On July 2, 1990, the Respondent was advised by letter of settlement calculations made on behalf of employees at Guymon, Moultrie, and at the Tampa sales unit.[28] On August 16, 1990,[29] Attorney Sykes replied as follows:

> [T]he Tampa back pay calculations are wrong and totally unacceptable. Mr. Darch's letter of December 29, 1989, to you accurately sets forth our view. No back pay is due to any Tampa employees as none of them sought transfer to Guymon or Moultrie, which were the only two plants where SIPCO failed to apply the master agreement. To claim that the Tampa employees had transfer rights in August of 1981 to Swift & Co. plants, a separate company who was dismissed from the complaint by the Board, is, simply put, incorrect.
>
> SIPCO will not pay back pay to its former Tampa employees who sought to transfer to Swift & Co. plants, a totally separate and distinct employer, who was dismissed from the case. SIPCO only failed to apply the master agreement to Guymon and Moultrie. It would have been a legal impossibility for SIPCO to apply the agreement to Swift & Co. plants. I think you will find the UCFW concurs in this position. How can we transfer people to plants we neither own or control?[30]

Attorney Sykes claims that he was so worked up in drafting this document that there was ''steam coming off the paper.'' Yet, in advancing his argument, he simply asserts that ''I think'' the Union would ''concur.'' Nowhere does he state that either the Board or the Union, directly or indirectly, had ever communicated an assent to that view. The pattern continued in Sykes' memo to Union Attorney Robert Funk, dated August 16, 1990. In that document Sykes advised that no backpay would be paid to any Tampa employee ''unless he was denied a transfer to a SIPCO master contract plant.'' In making his point, Sykes articulated his position as a correct legal interpretation, but nowhere states that the matter had been broached prior to settlement. (R. Exh. 3.) If Attorney Sykes held any understanding that he had exacted union or Board assent to his view, he certainly would have taken these occasions to stress the point.

Ultimately, he did so, but by letter of November 27, 1990. At that juncture, Sykes attempted to firm up his position by stating that ''I told them [the Union and Board] that no backpay was due as it was my understanding that none of the Tampa employees, had sought to transfer to Moultrie or Guymon.'' This representation would turn out to be broader than his testimony. Thus, nowhere does he testify to ever, in timely fashion, having raised the issue with any representative of the Board. In this respect, concern arises as to why, if Sykes had been candid with the Union on this point, he would not have disclosed his position to the Board. In the final analysis, any assumption that Sykes honestly held the view that the Union accepted his position, would necessarily excuse the unlikely behavior of this experienced labor attorney in electing to leave the matter open, rather than put it to rest with specific terminology in his own settlement proposals.

Consistent with the doubt is my suspicion concerning Sykes' testimony that he mentioned his position to the Union before execution of the settlement. Attorney Funk denied that this was the case. There is no question that prior to December 1988, Sykes was a vigorous protagonist of settlement on behalf of the SIPCO group (SIPCO, SIC, and New Sipco, Inc.).[31] He, surely, would have been sensitive to the possibility that this effort would fall on its face on suggestion that no backpay had accrued under the Tampa finding. It was fully within probability that any revelation along that line would produce an immediate barrage from those who would have known that the Board acted on evidence that transfers were exercised only to plants of Swift & Co., and that, in July 1981, when transfer options were exercised, the master agreement had not been withheld at Guymon or Moultrie. At the same time, having admittedly read the briefs in the unfair practice proceeding, Sykes would have been alerted to the fact that the proponents of the complaint never acknowledged such a limitation, but consistently claimed that contractual transfer provision applied to all plants covered by the master agreement in general, and to the Swift plants in particular. Having succeeded in securing reversal of Judge Jacobs on that issue, their would be no apparent reason to suspect that either the General Counsel or the Charging Party would yield the fruits of this effort by accepting any settlement that would nullify the rights of Tampa employees while merely obtaining a fraction of the backpay due to discriminatees at Guymon and Moultrie.[32]

On the foregoing it is concluded that the settlement approved by the Board on December 22, 1988, was a binding and enforceable agreement, which incorporated no mutual understanding as to the scope of SIPCO's backpay obligation

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with negotiations and collateral litigation pertaining exclusively to the discriminatees at Guymon and Moultrie. During that time frame, on two occasions, Board agents requested, and under the good offices of Attorney Sykes, were provided information concerning Tampa employees. In any event, there was neither need, nor opportunity for any Board agent to take issue with Sykes' interpretation until apprised of its existence.

[28] G.C. Exh. 14.

[29] Attorney Sykes testified that he did not read this letter because it was in an envelope within a carton containing payroll records that, according to his direction, was returned to the client without examination. He replied only after receiving a Board agent's followup letter dated August 13, 1990. (G.C. Exh. 15.)

[30] G.C. Exh. 16. Sykes was informed on September 19, 1990, that his letter had been forwarded to headquarters in Washington, D.C., for a response. (R. Exh. 20.) In addition, Sykes was directed at that time to forward signed notices for mailing to the Moultrie and Guymon discriminatees.

[31] Sykes testified that he had been involved with SIPCO since September 1987. He relates that he reviewed Judge Jacobs' decision in the underlying unfair labor practice case, together with exceptions filed by the Union, and concluded that the dismissal as to SIPCO was wrong and feared it would be reversed. It is the sense of his testimony that, prior to the Board's reversal of Judge Jacobs, he unsuccessfully counseled SIPCO to seek a settlement. As Attorney Sykes had anticipated, on June 29, 1988, Judge Jacobs was in fact reversed by the Board. By letter dated July 7, 1988, Sykes notified the Union that he had been retained ''to represent Swift Independent Packing Company relative to settling, if possible, the above case.'' R. Exh. 24.

[32] In his testimony, Sykes states that prior to October 4, 1988, rough estimates made in his office suggested that $12.5 million could be due to former employees at these locations. The General Counsel's estimates were more in the neighborhood of $8 million. (R. Exh. 2.)

to the Tampa sales employees, but as stated on its face, relegated any such issue to determination by the Board.

b. *The scope of the Board's unfair labor practice finding*

The Respondent reasons that the Board could not have intended its remedy to reach plants of the new Swift & Co. There can be no question that SIPCO was the sole target of the Board's findings:

> ''We . . . find that Respondent SIPCO violated Section 8(a)(5) and (1) by failing to provide the unit employees in the Tampa, Florida facility the full range of transfer opportunities set forth in the master agreement.'' As the record does not establish that any of the remaining Respondents played any direct role in this conduct, we shall dismiss the allegation with respect to the remaining Respondents.

The Board did not question that, as of May 11, 1981, when SIPCO declined to recognize the full range of transfer rights, SIPCO and the new Swift & Company were separately owned and managed, and for all intents and purposes were separate corporate entities. Moreover, the Board made no finding that SIPCO and Swift & Company constituted a single/joint employer or alter egos. Against this background, the Respondent argues that, by limiting its finding to SIPCO, and directing it alone to ''implement the full range of transfer opportunities,'' the Board did not contemplate that SIPCO would hold any obligation with respect to plants of other entities, including those of Swift & Co.

The Board's intention must be gleaned from the violation found.[33] It is beyond dispute that SIPCO was deemed to have unilaterally repudiated the transfer rights set forth in article 77 of the master contract. The only evidence bearing on the Board's understanding of constituent elements within the ''full range of transfer opportunities'' is evident from the facts supportive of this finding, summarized at 289 NLRB at 432:

> [I]n August 1981, SIPCO's Tampa sales unit facility was closed. The Tampa employees, who were covered by the master agreement, were permitted to transfer to SIPCO facilities also operating under the master agreement but were not permitted to transfer to Moultrie, Guymon or any Swift & Co. facilities. The provisions of the master agreement permitted transfer to any plant under the master agreement whenever a plant closed. 289 NLRB at 427.

Thus, Moultrie, Guymon, and Swift & Co. facilities were the only locations mentioned by the Board to which transfer rights were denied. Consistent with other findings by the Board, as of May 11, 1981, all such facilities were covered by the master agreement. While the Board did not specifically conclude that the 8(a)(5) violation was based on transfers denied to Swift plants, it could not have found otherwise. There was no evidence that transfer preferences were rejected elsewhere. Thus, the parties stipulated in the underlying unfair labor practice case that transfer elections were denied only to Swift & Co. facilities, with 11 Tampa meat sales employees initially having been refused transfer to Tampa (PROC), 10 to St. Charles, and 6 to Omaha. (G.C. Exh. 23.)[34] Thus, if as the Respondent argues, contractual transfer rights could not be exercised with respect to those locations, the Board knowingly found a violation and issued a make whole order in the face of undisputed evidence that that the transfer rights were legitimately denied.

In essence, the Respondent's contention amounts to a collateral challenge to the merits of the Board's unfair labor practice finding. As counsel for the General Counsel observes, the argument that SIPCO could not apply article 77 to the Swift plants ''is precisely the argument considered by the Board and rejected.'' While the Board did not expressly do so, its decision cannot be read any other way. Thus, the 8(a)(5) allegation was initially dismissed by Judge Jacobs on grounds that, as a mere ''successor'' to Swift & Co., SIPCO was not bound by the master agreement. The General Counsel took exception. Defense attorneys countered with the precise argument made here, namely, that article 77 could not have been violated by SIPCO's failure to honor transfers to Swift plants. Thus, in an answering brief filed on behalf of SIPCO and others, the Board was specifically admonished that ''[SIPCO] . . . . certainly could not apply the Master Agreement at Swift units, as it had no control over Swift's operations . . .'' and therefore SIPCO ''did not violate the Act by not permitting Tampa employees to transfer to Swift facilities.''[35]

The Board rejected this position sub silentio. It reversed Judge Jacobs' dismissal, but invoked no legal theory or reasoning that altered the corporate separateness of SIPCO and

[33] I do not agree with the General Counsel that SIPCO's position in this respect is negated ''on the face'' of the Board's decision and ''without reference to extrinsic evidence.'' To prove the point, counsel for the General Counsel goes to great lengths to remove from context observations by the Board and then to editorialize them into specific findings. Had the Board made such findings, their truly would have been no basis for the Respondent's contention. However, as matters stand, were I to adopt the General Counsel's view it surely would produce instant reversal. The fact of the matter is that the Board reversed Judge Jacobs on the issue of whether the the master agreement was binding on SIPCO, and on finding that it was, did not engage in any direct analysis of the scope of the contract, nor provide specific guidance as to how, with dismissal of Swift & Company, SIPCO was obligated under the contract to effect transfers outside its corporate realm. Contrary to the General Counsel, the Board made no concrete finding—so clear as to dispense with any need for interpretation—that SIPCO breached the master agreement when it denied transfer to ''Swift & Co. facilities.'' Instead, resolution of the issue requires exhaustive reference to extrinsic evidence and reason.

[34] There was no evidence that transfers were sought to Guymon or Moultrie. At times material, this was understood by the parties. Thus, in its brief to the Board, p. 42, counsel for the General Counsel signaled that the case was in this posture, asserting that : ''[B]y denying the Tampa employees the right to transfer to Swift plants covered by the Master Agreement, Respondents unilaterally changed the transfer provisions in violation of Section 8(a)(5) and (1) of the Act.'' Moreover, well after the Board's decision, Attorney Sykes in a letter to the Regional Office dated August 16, 1990, stated ''No backpay is due to any Tampa employees as none of them sought transfer to Guymon or Moultrie . . . .'' G.C. Exh. 16.

[35] Attorney Sykes, who claims to have studied certain briefs filed with the Board and the Board's decision prior to the settlement proposal, knew or should have known that this contention was a matter of record in the underlying case.

Swift & Co., or for that matter, New Sipco, Inc.[36] Instead, SIPCO was deemed bound to the 1979–1982 master agreement in consequence of a ''stock sale,'' a concept that did not intrude on corporate separateness, as would have been the case were the Board to have viewed them as a single employer or alter ego. Thus, the Board although alerted to the corporate distinctions, found the violation anyway, and did so in the face of evidence that Tampa sales employees had opted for transfer *only* to Swift & Company plants. It is apparent therefore that SIPCO's present contention is not materially different from that made previously to the Board in its behalf and implicitly rejected. Accordingly, as it is not within my authority to review findings by the Board in a compliance or any other type proceeding, the Respondent's position is not maintainable at this level.

In any event, the separate entity theory would not appear to offer an avenue for escape from article 77 of the 1979–1982 master contract, or a basis for effective challenge to the Board's unfair labor practice finding. That agreement did not limit employees to intraunit transfers, but sanctioned them between bargaining units at all locations covered by the contract.[37] In this regard, Section 77(a) thereof provides that:

> [A]n eligible employee has the right to be transferred from the plant at which he is employed to another plant covered by this Agreement where such an employee is subject to being permanently separated from the service . . . .

SIPCO's nominal predecessor, known prior to October 1980 as Swift & Company, was the entity signatory to that agreement. It was executed by Swift & Company with full knowledge that all its employees were covered, whether assigned to the fresh meat or processed meat operations. The midterm, corporate reorganization that separated these firms did not alter the basic contractual formula for interunit exercise of transfer rights. Indeed, as of May 11, 1981, Swift & Company had not repudiated and was still honoring the contract at its plants, including St. Charles, Omaha, and Tampa (PROC).

The Board's finding that the stock sale did not curtail SIPCO's obligations under the contract, as a reality, meant that each in its own name was bound, hence tying the knot on an ongoing, enforceable contractual undertaking between both firms to extend reciprocal transfer rights to employees in the separate bargaining units of the other, irrespective of corporate status. In other words, the Board's conclusion was the equivalent of a scenario in which two independent firms knowingly sign a single contract covering separate bargaining units, but providing integrated benefits. Their separateness would not impede the enforceability of their agreement.

Consistent with the foregoing, because SIPCO rejected the elections for transfer to Swift & Co. plants, the desires of the Tampa employees were frustrated at that point, interdicting any reaction from Swift & Co. Thus, the latter engaged in no illegal conduct and dismissal of the allegation against it was required. However, that fact did not render the Board powerless to enforce the collective-bargaining agreement against SIPCO, the offending party.

For these reasons, the Board's failure to implicate Swift & Co. did not alleviate losses sustained by the victims of SIPCO's unlawful refusal to bargain.[38] The propriety of the Board's directive that they be made whole is valid on its own footing and is enforceable without disruption of the corporate veil.[39] Thus, SIPCO violated the contract and its remedial obligation is unaffected by the fact that another corporate entity failed to join in the breach. The impairment of those contractual rights, as they would later mature in 1981, was subject to monetary redress by SIPCO alone, without necessity for findings of illegality by Esmark, New Sipco, Swift & Company, Swift Independent Corporation, or any other firm. In passing, it is noted that the Respondent's position also raises question as to whether its obligation to reimburse ought be lessened by complications of its own doing. For, it was SIPCO itself that engaged in the corporate give away that, under its theory of the case, curtailed the spectrum of contractual transfer options.[40]

[36] Considered in light of the Respondent's position that contractual transfer rights extended to Guymon and Moultrie plants, it might be said that the above argument proves too much. For, Guymon and Moultrie, as of May 11, 1981, were also in the hands of a separate entity. Thus, as indicated above, in late April 1981, these plants were transferred to New Sipco, Inc. The Board, as in the case of Swift & Co. dismissed as to New Sipco, Inc. There was no finding that SIPCO and New Sipco, Inc. were single/joint employers or alter egos. Hence as the Respondent's argument goes, the Board would be equally powerless to compel implementation of transfer rights at Guymon and Moultrie.

[37] There is no merit in the Respondent's contention that the 1980–1981 corporate reorganization fractured the collective-bargaining unit, thus, precluding the exercise of transfer rights between food processing operations (Swift & Co.) and fresh meat operations (SIPCO). Here again, the Respondent is contesting the substantiality of a Board finding. In any event, article 77 did not contemplate the exercise of rights within a single bargaining unit. The 1979–1982 master collective-bargaining agreement did not cover a single multiplant unit, but as found by the Board, at the time of its execution, ''employees were represented by the Union in separate units designated in and covered by one master agreement.'' 289 NLRB at 423. This is confirmed by the answer filed on August 21, 1981, by SIPCO et al. in the underlying unfair labor practice case where it conceded that the master agreement covered 19 meat packing plants and 7 sales processing units, each being a separate appropriate unit.

[38] One soft spot in the Board's remedial package appears in its directive that SIPCO:

> (a) On request, implement the full range of transfer opportunities provided for in the 1979-1982 master collective-bargaining agreement with the United Food and Commercial Workers International Union, AFL–CIO, for employees in the . . . appropriate unit.

Obviously, SIPCO could not require Swift & Co. to honor a transfer option exercised by any of its employees. Nevertheless, this provision, did not totally lack utility. For, it is entirely possible that this was a calculated step by the Board, fully aware of implications of its otherwise timeless backpay remedy, to encourage SIPCO to seek an accomodation through which Swift & Co. might voluntarily recognize transfer rights under the umbrella of the master agreement.

[39] In this respect, the Board ordered SIPCO to:

> (b) Make whole all unit employees of the Tampa, Florida facility for any loses they may have suffered as a result of the Respondent's denial of the full range of transfer opportunities provided for in the 1979–1982 master collective-bargaining agreement.

[40] SIPCO alone, during the term of the collective-bargaining agreement and on October 27, 1980, through dividend, ceded to Esmark its ownership of the new Swift & Company. In taking that step, SIPCO surrendered control over the latter's plants. As stated by Judge Cudahy, ''[SIPCO] is an old Company dating to the 19th cen-

In any event, even if there were a material flaw in the unfair labor practice finding, SIPCO's election to execute the settlement, rather than to contest the Order, entailed an acceptance of the Board's findings and remedy and was curative in all respects. Nothing in the settlement agreement reopened the merits of the Board's unfair labor practice finding.

c. *Specific limitations on contractual transfer rights*

The Respondent also argues that the 23 claimants lost eligibility for backpay by accepting severance pay or retirement as contemplated by article 77(j) of the governing collective-bargaining agreement, which provides as follows:

> An employe's [sic] rights of transfer under this Section shall terminate in the following circumstances:
> . . . .
> (2) Upon acceptance of severance pay.
> (3) Upon retirement under the terms of the Pension Plan.

Of the claimants, four (Davies, Frain, Gardner, and Jenkins) retired under the terms of the pension plan, and 18 others (Cowell, Crews, Clayton, DeBerardinis, Fitzgerald, Freitas, Hargrove, Hobgood, McFadden, McNeal, Merrill, Morgan, Morrell, Murray, Radford, Simmons, Springer, and Swindal) accepted severance pay.

The Respondent observes that ''[n]ot a scintilla of evidence was introduced to show how a person can retire under the pension plan or accept severance pay and still qualify . . . to be considered for a transfer.'' It having been established that each of these individuals took steps to exercise an article 77(A) transfer on a timely basis, the burden was on the Respondent to show that retirement and transfer, as appropriate, was selected for reasons unrelated to the unlawful denial of their first preference. As matters now stand, the record merely establishes that SIPCO's failure to provide these employees ''the full range of transfer opportunities''[41] forced the latter to accept lesser forms of remuneration or nothing at all—a ''Hobson's choice'' which falls well short of achieving the remedial ends contemplated by the Act. The compliance specification properly treats the severance pay and retirement contributions as a set off to gross backpay.

Beyond the foregoing, the Respondent observes that article 77 sets forth a variety of eligibility requirements and contends that no backpay is due and owing because the General Counsel failed to adduce evidence that each claimant complied with such criteria. On the contrary, if in fact any of these individuals were disqualified, the burden was on the Respondent not only to raise the specific ground in its answer, but to substantiate the noncompliance with persuasive evidence. The General Counsel's obligation with respect to gross backpay need not dispel every conceivable defense that might be raised against individual claimants.

C. *Pension Credits*

In addition to lost wages, the General Counsel argues that the discriminatees are entitled ''to additional pension credit entitlement as part of the gross backpay owing to the Tampa claimants.'' Insofar as discernable on this record, the claim was not communicated to the Respondent until December 6, 1991, when SIPCO was served with a second amended compliance specification, dated December 6, 1991. It is described in two paragraphs thereof, which, in material part state:

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> (b) . . . . [E]ach of the discriminatees were participants in the Esmark Inc./Swift & Company Pension Plan for Non-Salaried Employees. The amount of a participant's pension is calculated by multiplying the individual's credited service by the amount specified in the Master Collective Bargaining Agreement. Pursuant to the Pension Plan, entitlement to such pension vests after 10 years of credited service. Thus, each discriminatee, who was denied the full range of transfer opportunities to a plant covered by the Master Agreement is entitled to have his credited service and/or pension amount corrected by the number of years he would have continued in the employ of the Respondent during the backpay period.
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> VIII
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> Summarizing the facts . . . specified above, the obligation of the Respondent to make whole the discriminatees under the Board Order will be discharged by payment to the employees named below the amounts set opposite their names, plus interest accrued to the date of payment . . . and by crediting the discriminatees service date by the number of months/years from August 7, 1981 to . . . the date of the Settlement Agreement and adjusting the individual discriminatee's annual pension where appropriate.[42]

In its answer, the Respondent, insofar as material, stated as follows:

> Respondent specifically denies all allegations of paragraph III(b) and states that no employee of SIPCO, Inc. remained a participant of the Esmark, Inc./Swift & Company Pension Plan for Non-Salaried employees.

Paragraph III(b) of the Second Amended Specification did not appear until almost 3 years following Board acceptance of the settlement agreement on December 21, 1988. It bears

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tury, which merely gave away its name and *a large number of its operations*.''(Emphasis added.) 887 F.2d at 743 fn. 2. Absent this gesture, the Respondent would be in no position to distinguish between the plants of Swift & Co. and those of New Sipco, Inc., and hardly could claim that it was powerless to comply with any aspect of the Board's Order. Thus, any impossibility of performance was created by the SIPCO itself—a step taken when, pursuant to the contract in effect at the time, it had a putative obligation to permit the exercise of transfers to meat processing operations.

[41] While it is unnecessary to the result, I give no weight to testimony of Robert Funk, a union attorney, that the Union's position throughout the litigation has been that when claimants in this proceeding elected to receive severance pay or to accept retirement, they did so ''under protest.'' Attorney Funk was not involved in the underlying litigation, and the foundation for his testimony is not established on this record.

[42] The various specifications issued in this proceeding do not arise under any 8(a)(3) violation, and hence the continuing reference to the claimants as ''discriminatees'' is taken as an inadvertent misnomer.

all the earmarks of afterthought and constituted an attempt to expand the scope of the settlement agreement years after the intentions embodied there had crystalized. Thus, when the original specification issued on April 12, 1991, there was no claim for pension credits. This, despite the exhaustive opportunity to research and investigate just what was due under the 1988 settlement agreement. Indeed, once raised, the claim for pension credits was given so little attention that it required radical surgery at the hearing. Thus, paragraph III (b) was amended on February 27, 1992, over the Respondent's objection, well after the General Counsel had rested, to reflect that the claimants ''were participants in Swift Independent Packing Company Non-salaried Pension Plan.'' This corrected an allegation which as originally drafted was so ill-reasoned that, in combination with paragraph VIII, it laid claim to pension credits under a pension plan in which SIPCO employees did not participate, and which was administered by corporate entities other than SIPCO.[43]

Moreover, the new claim was pursued in such haste that it was unaccompanied by attempt to identify the incremental amount by which each claimant's pension should have been increased during the backpay period or to liquidate the Respondent's liability in this respect. In the General Counsel's posthearing brief it is stated that: ''All the information necessary for calculating the pension credit adjustment is already in the record, and it would not be necessary to reopen it.'' Why then, during the 3 years since the parameters for this proceeding had been set, had the General Counsel failed to complete the task?

The claim for pension credits is also at odds with a reasoned interpretation of the intentions underlying the settlement.[44] The settlement agreement was a compromise that supplanted the Board's Order. Having entered that agreement, the claimable relief is governed by that document, rather than the Board Order or any term of art customarily used in formal Board remedies. The parties entered an adjustment, which the Board approved, using the term ''backpay,'' rather than ''make whole,'' and in doing so, fixed the standard by their own choice of terminology. Thus, it is of no moment that ''backpay'' and ''make whole'' are routinely considered synonomous and all-embracing where a party contests the scope of a Board order. See, e.g., *Rainbow Tours*, 280 NLRB 166, 185 (1986). On the facts at hand, it is inconceivable that anyone negotiating this settlement on behalf of the Board expected recovery beyond lost wages and accrued interest. The formula agreed to is consistent with that end. Thus, the policies of the Act hardly would be vindicated through a settlement formulation which discriminates against the beneficiaries of an 8(a)(3) finding by providing less in their case than that provided others whose entitlement derives from some lesser offense. Here the Board was willing to settle the Section 8(a)(1), (3), and (5) violations at Moultrie and Guymon on the basis of an interest only payment, which, in its entirety, was based on a compromise of lost wages only. Compliance Officer Marge Peck acknowledged that the discriminatees at those locations also lost retirement credits. Yet, neither the Union, nor the General Counsel held out any concern for their losses. The Union and the General Counsel neither sought, nor obtained more at Tampa. I find that just as in the case of the *discriminatees* at Guymon and Moultrie, the focus of the parties at Tampa was on lost wages, and that it would be contrived and totally unjust to construe the settlement agreement as embodying intention on either side that SIPCO ''make whole'' the Tampa employees in every conceivable sense.[45] I find that the settlement agreement included no provision requiring SIPCO to compensate the claimants for lost pension benefits.

ORDER

The Respondent, SIPCO, Chicago, Illinois, its officers, agents, successors, and assigns, shall make whole the employees named below by paying them the liquidated sums indicated below, plus interest in the matter prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), less tax withholdings required by Federal and local laws.

John D. Cowell	$62,797
Willie Crews	123,943
James Davies	40,523
Clayton Dean	20,613
Anthony DeBernardinis	12,873
Donald Fitzgerald	13,955
Roland Frain	38,279
Joseph Freitas	138,978
Lester A. Fritz[46]	17,090

[43] This belated shift in the General Counsel's premise was far from surprising. The original language was totally defective. Consistent with the Respondent's answer, SIPCO, as of August 8, 1981, had no influence over the Esmark/Swift pension plan. As stated by Judge Jacobs at 289 NLRB at 450:

> *Since April 1981 and the public sale, none of the Esmark pension boards nor any Esmark employee has had anything to do with any pension plan covering SIC, SIPCO, or New Sipco employees.* [Emphasis added.]

At 289 NLRB 427, the Board concluded ''Esmark no longer plays any role in the . . . pension plans, of SIPCO or New Sipco . . . .'' Paragraph VIII did not seek monetary compensation for pension losses, but, rather, the enhancement of pension benefits through credits under the Esmark Inc./Swift & Company Pension Plan Plan itself. Absent any attempt to implead Esmark or any of its wholly owned subsidiaries, the Board could not require these separate entities to give force and effect to pension credits awarded to SIPCO personnel.

[44] As indicated by me at the hearing, this claim supports an accrued liability which is undefinable since its costs will not be determinable until death of the last surviving claimant.

[45] The settlement agreement's cutoff date also seems inconsistent with any intention to compensate employees for lost pensions. Thus, to curtail liability as of the date the accomodation was entered is consistent with settlement practices where recovery of lost wages is all that is contemplated. Such a cutoff is arbitrary and illogical when applied to lost pension benefits.

[46] In its answer, SIPCO asserted that the backpay entitlement of Fritz should have been terminated on May 21, 1982, when he voluntarily quit his employment at SIPCO's Glenwood, Iowa plant. Fritz initially requested transfer to a Swift plant in Chicago, Illinois. It was only after that option was denied unlawfully that he chose Glenwood. Fritz testified that he left his job at Glenwood because of personal problems stemming from the fact that his wife and four children remained in St. Petersburg, Florida. He insists that his family would have accompanied him to Chicago where relocation would have been eased by the fact that both he and his wife had relatives in Detroit, Michigan, which was close enough for periodic visits. The Respondent, in its posthearing brief, has failed to raise any question as to the veracity of Fritz, or to furnish a basis for concluding that he terminated his employment at Glenwood for reasons that

Elton R. Gardner	16,947
Lynn Hargrove	42,054
Bill Hobgood	30,971
Donald Jenkins	29,832
George McFadden	38,337
Bernie McNeal	59,087
Sherwood L. Merrill	53,193
Jose Morejon	113,567
Robert R. Morrell	20,139
Frank H. Murray	65,253
Elbert L. Radford	123,002
Bruce Simmons	54,351
Russell Springer	46,698
Paul Swindal	17,549

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were either unreasonable or unrelated to the unlawful refusal to honor his request for transfer to Chicago. I find that Fritz backpay entitlement was not tolled when he returned to Florida and quit his job at Glenwood, Iowa.